KANG HAI HOLDINGS SDN BHD & ANOR v. LEE LAI BAN

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABU SAMAH NORDIN FCJ
ZAHARAH IBRAHIM FCJ
PRASAD SANDOSHAM ABRAHAM FCJ
[CIVIL APPEAL NO: 02(f)-65-09-2016 (J)]
19 DECEMBER 2017

COMPANY LAW: *Directors – Authority – Tenancy agreement – Whether former director had ostensible authority to enter into tenancy agreement on behalf of company – Whether tenant 'outsider' dealing with company – Whether deemed to have constructive notice of identity of directors and managers of company – Whether rule in Turquand's case applies – Whether 'outsider' should have made searches on status of directors of company – Whether 'outsider' imputed with particulars of Form 49 – Whether failure to make searches denied outsider protection of rule in Turquand's case*

The first appellant ('KHH') was the owner of lands known as lots 2929 and 2930 whereas the second appellant ('KHR') was the owner of lot 2980. The first defendant at the High Court ('Siva') was a former director of KHH and KHR, who ceased to be the director of the companies on 15 September 2008 and 19 August 2009 respectively. Despite ceasing to be a director of KHH, Siva proceeded to engage the respondent ('Lee') to extract earth from lots 2929 and 2930 from May 2009. Siva and Lee entered into a tenancy agreement dated 8 September 2009 over lots 2929 and 2930 whereby Lee was to extract and purchase earth from lots 2929 and 2930 up to 2012. In September 2010, the director of KHH and KHR informed Lee that Siva was never authorised to transact on behalf of the company. Despite this, Lee continued extracting earth from the lands up to December 2010. The plaintiffs' claim against the defendants were, *inter alia*, that (i) Siva fraudulently held himself out as a director and manager of KHH and forged a letter which purported to engage Lee to extract and purchase red earth and rock materials from KHH's lands; (ii) Siva, having fraudulently held himself out to the Batu Pahat Land Office as an authorised officer of KHH, forged a memo for the purpose of renewing a permit for the extraction of rock materials from lot 2929 for a period of one year; (iii) from late 2009 to the end of 2010, Lee, acting under the directions of Siva, gained unlawful entry on the land and extracted and removed red earth and rock materials therefrom; (iv) at all material times, Lee knew that Siva was not an authorised representative of the plaintiffs and/or chose to be oblivious to this despite clear circumstances existing that would have justified an enquiry into the same; (v) Lee was put on notice of the illegal trespass on the plaintiffs'

lands and conversion of the red earth and rock material; and (vi) during this period, Siva received monies from Lee as payment for the purchase of the red earth and rock materials extracted from the lands and the payments were far below the market value of materials similar to 'red earth'. In his defence, Siva contended that, amongst others, he was a director of KHH at all material times and was not aware of his purported removal as director and also that he was, at all material times, acting with authority and instructions of Mr Lim Thian Hock ('LTH'), the managing director and owner of the plaintiffs. Lee's defence was essentially based on the rule in *Royal British Bank v. Turquand* (*'Turquand's* case'). The High Court allowed the plaintiffs' claim against Siva and Lee. On appeal, Court of Appeal allowed Lee's appeal against the plaintiffs holding that Lee was entitled to invoke the protection under the rule in *Turquand*'s case, whilst Siva's appeal was dismissed. Hence, the plaintiffs obtained leave to appeal against Lee on the following questions of law: (i) whether the rule in *Turquand*'s case apply to a situation where an outsider dealing with the company is deemed to have constructive notice of the identity of the directors and managers of a company as shown in Form 49 of the company; and (ii) whether an outsider could rely on the rule in *Turquand*'s case and the principles of ostensible authority of a person to bind a company where the 'holding out' or representation of authority was made solely by the person with no authority.

Held (allowing appeal with costs; setting aside order of Court of Appeal and restoring order of High Court)

Per Prasad Sandosham Abraham FCJ delivering the judgment of court:

(1) The tenancy agreement described the landlord as LTH, not KHH, who was the registered owner of the land. Looking at the position of the companies at the time when the tenancy agreement was entered into, in respect of KHH as at 13 September 2008, Siva had ceased to be a director whilst LTH continued to remain a director. In the case of KHR, whilst LTH was a director, Siva was not a director. (para 10)

(2) KHH and KHR's plea of representation of authority was against Siva and the specific representation that Siva was the MD/director of both companies at the time of execution of the tenancy agreement and the extraction of sand from the plaintiffs' lands. The searches clearly revealed that Siva was not a director nor MD of the plaintiffs' companies and Lee was deemed to have constructive knowledge of, and it did not matter whether he believed, by reputation or otherwise, that Siva was. (paras 11 & 12)

(3) Lee, who was the 'outsider' herein, did not verify the position of Siva in the plaintiffs' companies by way of a search. Lee did not check on the status of the land and all payments were made to Siva. The law imposes a minimum duty on the 'outsider' to, at the very least, make

the minimum check to afford the outsider the protection of the rule in *Turquand*'s case. It was held in *Pekan Nenas Industries Sdn Bhd* that 'the rule in *Turquand*'s case could not be invoked if the outsider relying on the rule knows or ought to have known that there is an irregularity. The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction [...]. The outsider thus bears the burden of showing that he is not disqualified from invoking the rule.' (paras 14 & 16)

(4) Siva's plea of actual authority had been rejected by both the High Court and Court of Appeal. It therefore followed that Siva acted on a frolic of his own. The High Court Judge was correct in rejecting the plea of ostensible authority as the evidence clearly showed that Lee could have ascertained the actual position by making the relevant searches. It was no longer a question of whether the 'outsider' had been put on enquiry, but the 'outsider' had imputed to him particulars of Form 49 and should have taken steps to enquire further to come within the rule of *Turquand*'s case. Question (i) was therefore answered in the negative. (paras 18 & 20)

(5) Siva had no authority to act for the companies. There were no resolutions produced to testify to that fact. The burden to show authority rested with Siva. His plea of authority had failed both in the High Court and in the Court of Appeal. Upon observation of the tenancy agreement, it was noted that it was LTH, and not Siva, who had signed the tenancy agreement as the landlord. Lee's pleadings clearly showed the representation of authority relied on were made by Siva to Lee and that Siva was the MD and director of both companies at the time of the contract but Lee had constructive knowledge that Siva was not. As Siva had no authority, actual or ostensible, to act for the companies, Lee could not plead the rule in *Turquand*'s case. Question (ii) was therefore answered in the negative. (paras 22, 24 & 25)

***Bahasa Malaysia** Headnotes*

Perayu pertama ('KHH') ialah pemilik tanah-tanah yang dikenali sebagai lot 2929 dan 2930 sementara perayu kedua ('KHR') ialah pemilik lot 2980. Defendan pertama di Mahkamah Tinggi ('Siva') ialah pengarah terdahulu KHH dah KHR, yang bukan lagi pengarah syarikat-syarikat itu, masing-masing semenjak 15 September 2008 dan 19 Ogos 2009. Walaupun bukan lagi pengarah KHH, Siva meneruskan dengan melantik responden ('Lee') untuk mengambil tanah dari lot 2929 dan 2930 sejak Mei 2009. Siva dan Lee memasuki perjanjian penyewaan bertarikh 8 September 2009 bagi lot 2929 dan 2930 iaitu Lee akan mengambil dan membeli tanah dari lot 2929 dan 2930 sehingga 2012. Pada September 2010, pengarah KHH dan KHR memaklumkan Lee bahawa Siva tidak pernah diberi kuasa untuk berurusan bagi pihak syarikat. Namun begitu, Lee meneruskan dengan aktiviti pengambilan tanah dari tanah-tanah tersebut sehingga Disember 2010.

Tuntutan plaintif-plaintif terhadap defendan-defendan, antara lain, adalah bahawa (i) Siva secara penipuan memperkenalkan dirinya sebagai pengarah dan pengurus KHH dan memalsukan surat yang kononnya melantik Lee untuk mengeluarkan dan membeli tanah merah dan batu-batan dari tanah-tanah KHH; (ii) Siva, setelah secara penipuan memperkenalkan dirinya kepada Pejabat Tanah Batu Pahat sebagai pegawai yang diberi kuasa oleh KHH, memalsukan satu nota bagi tujuan membaharui permit pengeluaran batu-batan dari Lot 2929 bagi tempoh setahun; (iii) dari lewat 2009 sehingga akhir 2010, Lee, bertindak atas arahan Siva, secara tidak sah memasuki tanah dan mengambil dan mengeluarkan tanah merah dan batu batan dari situ; (iv) pada setiap masa, Lee mengetahui bahawa Siva bukan wakil yang diberi kuasa oleh plaintif-plaintif dan/atau memilih untuk tidak mengendahkan perkara itu walaupun jelas wujud keadaan yang mewajarkan siasatan mengenainya; (v) Lee telah pun dimaklumkan mengenai pencerobohan tak sah atas tanah plaintif-plaintif dan pengalihan tanah merah dan batu-batan; dan (vi) semasa tempoh ini, Siva menerima wang daripada Lee sebagai bayaran bagi pembelian tanah merah dan batu-batan yang diambil dari tanah tersebut dan bayaran-bayaran tersebut amat rendah daripada nilai pasaran bagi bahan-bahan yang serupa dengan 'tanah merah' tersebut. Dalam pembelaannya, Siva menghujahkan, antara lain, dia adalah pengarah KHH pada setiap masa material dan tidak mengetahui tentang pembuangannya sebagai pengarah dan juga, pada setiap masa material, bertindak atas kuasa dan arahan En Lim Thian Hock ('LTH'), pengarah urusan dan pemilik plaintif-plaintif. Pembelaan Lee pada asasnya berdasarkan kaedah dalam kes *Royal British Bank v. Turquand* ('kes *Turquand*'). Mahkamah Tinggi membenarkan tuntutan plaintif-plaintif terhadap Siva dan Lee. Atas rayuan, Mahkamah Rayuan membenarkan rayuan Lee terhadap plaintif-plaintif dengan memutuskan Lee berhak membangkitkan perlindungan bawah kaedah dalam kes *Turquand*, sementara rayuan Siva ditolak. Oleh itu plaintif-plaintif memperoleh kebenaran merayu terhadap Lee atas soalan-soalan undang-undang berikut: (i) sama ada kaedah dalam kes *Turquand* terpakai dalam situasi orang luar yang berurusan dengan syarikat dianggap mempunyai notis konstruktif tentang identiti pengarah-pengarah dan pengurus-pengurus syarikat seperti yang terkandung dalam Borang 49 syarikat; dan (ii) sama ada orang luar boleh bersandar pada kaedah dalam kes *Turquand* dan prinsip-prinsip kuasa zahir seseorang untuk mengikat syarikat di mana respresentasi sebagai wakil dibuat hanya oleh seorang yang tiada kuasa.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Rayuan dan mengembalikan perintah Mahkamah Tinggi)

Oleh Prasad Sandosham Abraham HMP menyampaikan penghakiman mahkamah:

(1) Perjanjian penyewaan menyatakan tuan tanah adalah LTH, bukan KHH, sebagai pemilik berdaftar tanah. Memandangkan kedudukan syarikat-syarikat tersebut pada masa perjanjian penyewaan dimasuki, berkaitan

dengan KHH setakat 13 September 2008, Siva bukan lagi pengarah, manakala LTH kekal sebagai pengarah. Dalam kes KHR pula, sementara LTH adalah pengarah, Siva bukan pengarah.

(2) Pli wakil yang berkuasa KHH dan KHR adalah terhadap Siva dan representasi spesifik bahawa Siva ialah pengarah urusan/pengarah kedua-dua buah syarikat pada masa pemeteraian perjanjian penyewaan dan pengambilan tanah dari tanah plaintif-plaintif. Carian dengan jelas mendedahkan bahawa Siva bukan pengarah atau pengarah urusan syarikat plaintif-plaintif dan Lee dianggap mempunyai pengetahuan konstruktif berkenaan itu, dan tidak penting sama ada dia percaya, melalui reputasi atau sebaliknya, bahawa Siva adalah pengarah atau pengarah urusan.

(3) Lee, yang adalah 'orang luar' dalam kes ini, tidak mengesahkan kedudukan Siva dalam syarikat plaintif-plaintif melalui carian. Lee tidak memeriksa status tanah dan kesemua bayaran dibuat kepada Siva. Undang-undang mengenakan tanggungjawab minimum pada 'orang luar' sekurang-kurangnya, untuk membuat pemeriksaan minimum supaya orang luar itu diberi perlindungan bawah kaedah dalam kes *Turquand*. Diputuskan dalam kes *Pekan Nenas Industries Sdn Bhd* bahawa 'kaedah dalam kes *Turquand* tidak boleh dibangkitkan jika orang luar yang bersandar pada kaedah itu mengetahui atau wajar mempunyai pengetahuan bahawa terdapat ketidakaturan. Masa material pengetahuan atau cara mengetahui tentang perkara itu adalah masa transaksi dimeterai [...]. Oleh itu, orang luar mempunyai beban menunjukkan bahawa dia layak membangkitkan kaedah itu.'

(4) Pli Siva bagi kuasa sebenar ditolak oleh Mahkamah Tinggi dan Mahkamah Rayuan. Berikutan itu, Siva bertindak sendiri. Hakim Mahkamah Tinggi betul dalam menolak pli kuasa zahir kerana keterangan jelas menunjukkan bahawa Lee boleh memastikan kedudukan sebenar dengan membuat carian relevan. Ini bukan lagi persoalan sama ada 'orang luar' telah dipersoal, tetapi 'orang luar' mengetahui butiran dalam Borang 49 dan sepatutnya mengambil langkah-langkah untuk menyiasat lanjut supaya boleh terangkum dalam kaedah dalam kes *Turquand*. Oleh itu, soalan (i) dijawab secara negatif.

(5) Siva tidak mempunyai kuasa untuk bertindak bagi syarikat tersebut. Tiada resolusi dikemukakan untuk mengesahkan perkara itu. Beban untuk menunjukkan kuasa adalah pada Siva. Pli kuasanya gagal di kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan. Berdasarkan perjanjian penyewaan, dilihat bahawa LTH dan bukan Siva, yang telah menandatangani perjanjian penyewaan sebagai tuan tanah. Pliding Lee jelas menunjukkan pewakilan kuasa yang disandarkan dibuat oleh Siva

kepada Lee dan bahawa Siva adalah pengarah urusan dan pengarah kedua-dua syarikat pada masa kontrak tetapi Lee mempunyai pengetahuan konstruktif bahawa Siva bukan pengarah urusan dan pengarah kedua-dua syarikat. Oleh sebab Siva tidak mempunyai kuasa, sebenar atau zahir, untuk bertindak bagi pihak syarikat-syarikat, Lee tidak boleh memplidkan kaedah dalam kes *Turquand*. Soalan (ii) dengan itu dijawab secara negatif.

Case(s) referred to:

Criterion Properties v. Stratford UK Properties [2004] UKHL 28 ***(refd)***

Freeman and Lockyer (A Firm) v. Buckhurst Park Properties (Mangal) Ltd & Another [1964] 1 All ER 630 ***(refd)***

KL Engineering Sdn Bhd & Anor v. Arab Malaysian Finance Bhd [1994] 1 LNS 185 SC ***(refd)***

Northside Developments Pty Ltd v. Registrar General And Others [1990] 93 ALR 385 ***(foll)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(foll)***

Royal British Bank v. Turquand [1843-60] All ER Rep 435 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

For the appellant - David Matthews, Harvinderjit Singh & Malarvily Perumal; M/s Vin Partnership

For the respondent - HY Lee; M/s Lee Han Yen & Co

[Editor's note: For the Court of Appeal judgment, please see Lee Lai Ban v. Kang Hai Holdings Sdn Bhd & Anor And Another Appeal [2015] 1 LNS 1382 (overruled); Appeal from High Court Muar; Civil Suit No: 23NCVC-9-12-2011 (affirmed).]

Reported by S Barathi

JUDGMENT

Prasad Sandosham Abraham FCJ:

Introduction

[1] We heard this appeal and the arguments presented by the appellants and the respondents on 27 September 2017 and we reserved the matter to a date to be fixed. We now deliver our judgment on the same to support the orders the court makes today.

[2] This appeal touches on the question of the rule in *Turquand* as it is commonly referred to in company law. As it is essentially a fact driven appeal, before dealing with the specific questions posed, the material facts should be dealt first. We will refer to the parties by their names as they were described in the High Court.

Material Facts

Undisputed Facts

[3] The first plaintiff (KHH) is the owner of lands known as lots 2929 and 2930 whereas the second plaintiff (KHR) is the owner of lot 2980. The first defendant at High Court (Siva) was a former director of KHH and KHR, who ceased to be a director of KHH and KHR on 15 September 2008 and 19 August 2009 respectively.

[4] Siva proceeded to engage the respondent (Lee), despite ceasing to be a director of KHH, to extract earth from lots 2929 and 2930 which commenced from May 2009. Siva and Lee thereafter entered into a tenancy agreement dated 8 September 2009 over lots 2929 and 2930 whereby Lee was to extract and purchase earth from lots 2929 and 2930 up to 2012.

[5] However in September 2010, Lee met with a director of KHH and KHR who informed Lee that Siva was never authorised to transact on the company's behalf. Despite this, Lee continued extracting earth from the lands up to December 2010. A substantial amount of earth was extracted from lots 2929, 2930 and 2989, between May 2009 - December 2010.

Summary Of The Pleadings

Plaintiffs' Case

[6] The plaintiffs pleaded the following in their statement of claim:

(a) Siva fraudulently held himself out as a director and manager of KHH and forged the letter dated 1 September 2009 which purported to engage Lee to extract and purchase red earth and rock materials from KHH's lands;

(b) Siva fraudulently held himself out to the Batu Pahat Land Office as an authorised officer of KHH and forged a memo for the purposes of renewing a permit for the extraction of rock materials from lots 2929 for a period of one year commencing from 1 January 2010;

(c) From late 2009 to the end of 2010, Lee acting under the directions of Siva gained unlawful entry on the land and extracted and removed red earth and rock materials therefrom;

(d) At all material times, Lee knew that Siva was not an authorised representative of the plaintiffs and/or chose to be oblivious to this despite clear circumstances existing that would have justified an enquiry into the same;

(e) Lee was put on notice of the illegal trespass on the plaintiffs' land and conversion of the red earth and rock material at a meeting on 2 September 2010 between the representatives of the plaintiffs and Lee; and

(f) During this period, Siva received monies from Lee as payment for the purchase of the red earth and rock materials extracted from the land. These payments were far below the market value of materials similar to 'red earth'.

First Defendant's Defence (Siva)

[7] Siva premised his defence on the following facts:

(a) Siva was a director of KHH at all material times;

(b) Siva was not aware of his purported removal as director;

(c) Any removal of Siva as a director of KHH is unlawful and null and void;

(d) *Vide* two letters dated 1 July 2009 and 26 January 2010, respectively, Mr Lim Thian Hock, the managing director and owner of the plaintiffs, had appointed Siva as the general manager of the Kang Hai Group of companies and had delegated all powers and duties of managing KHH and KHR companies to Siva;

(e) Siva was at all times acting with authority and with the instructions of Mr Lim Thian Hock pursuant to the letters dated 1 July 2009 and 26 January 2010 respectively;

(f) The extraction and removal of the red earth from the plaintiffs' lands by Lee was done pursuant to a valid contract between the plaintiffs and Lee;

(g) Siva was authorised to collect payment and manage the plaintiffs' properties pursuant to a letter dated 15 February 2010 signed by Mr Lim Thian Hock; and

(h) The monies collected by Siva under the contract were given to the plaintiffs or Mr Lim Thian Hock on behalf of the plaintiffs.

Second Defendant's Defence And Counterclaim (Lee)

[8] Essentially Lee's defence is premised on these grounds:

Firstly, Lee paid a deposit of RM10,000 to KHR for the red earth in April 2009. In May 2009, he was given an offer by Lim Thian Hock in a letter dated 19 May 2009 (D48, tab 32 CCB). Secondly, he relied on Siva's representations in his dealings with him. Thirdly, he lawfully extracted and removed red earth and rock material from lots 2929 and 2930 pursuant to the 2009 letter and the tenancy agreement. Lee further counterclaimed for the loss of profits for breach of the 2009 letter and tenancy agreement.

Synthesis Of The Decisions Of The High Court And The Court Of Appeal

[9] On 22 August 2016, this court granted leave to appeal on two questions of law (AR pp. 2-4) and we deal with the first question posed first ie:

> (1) Can the Rule in *Turquand*'s case apply to a situation where an outsider dealing with the company is deemed to have constructive notice of the identity of the directors and Managers of a company as shown in the Form 49 of the Company?

[10] "The outsider" by terms of reference in this appeal would be Lee. The tenancy agreement in question is dated 8 September 2009 (tab 26 common bundle of document). The tenancy agreement describes the landlord as one Lim Thian Hock (LTH) not KHH who is the registered owner of the land in question. Looking at the position of the companies at the time of the said tenancy agreement ie, 8 September 2009, in respect of Kang Hai Holding Sdn Bhd (KHH) as at 13 September 2008, Siva had ceased to be a director whilst Lim Thian Hock @ Lim Thiam Hock (LTH) continued to remain a director. In the case of Kang Hai Realty Sdn Bhd (KHR), whilst LTH was a director, Siva was not a director.

[11] The plea of KHR was that Siva had represented and/or held himself out to be managing director (MD) and a director of the plaintiffs (see paras. 3, 4, 8, 9 and 10 of the statement of claim). KHH and KHR's plea of representation of authority was against Siva and the specific representation that Siva was the MD/director of both companies at the execution of the tenancy agreement and the extraction of sand from the plaintiffs' land.

[12] The searches clearly reveal that Siva was not a director nor MD of the plaintiffs' companies and that fact, Lee is deemed to have constructive knowledge of, and it did not matter whether he believed, by reputation or otherwise, Siva was. It is also abundantly clear that Lee did not make any company searches nor searches on the land.

[13] The defence of Lee is based essentially on the *locus classicus* in this area of the law ie, the rule in *Turquand* derived from the case of *Royal British Bank v. Turquand* [1843-60] All ER Rep 435 which is etched in almost every major text on company law. The case held and we quote:

> *Persons dealing with the company were bound to make themselves acquainted with the statute and the deed of settlement of the company, but they were not bound to do more; a person, on reading the deed of settlement, would find, not a prohibition against borrowing, but a permission to borrow on certain conditions, and, learning that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done; and, therefore, the company was liable whether or not a resolution had been passed.*
>
> (emphasis added)

[14] This principle has been adopted by this court with the necessary modifications in the case of *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 and to a whole plethora of cases that deal with the point. With the rapid development of modern technology, and the access to information available in the database of the Companies Commission of Malaysia, the law in our view imposes a minimum duty on the "outsider" to, at the very least, make this minimum check to afford the outsider the protection of the rule in *Turquand*. We refer to the decision of this court in *Pekan Nenas Industries Sdn Bhd* case (*supra*) where it was held:

> (2) *The rule in Turquand's case cannot be invoked if the outsider relying on the rule knows or ought to have known that there is an irregularity. The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction, in this case, 3 December 1990. The outsider thus bears the burden of showing that he is not disqualified from invoking the rule.* The Court of Appeal, in deciding the rule in *Turquand*'s case did not apply, relied on certain circumstances which it considered must have put Dato Tan, who represented the Purchaser/Intervener, 'on inquiry' and thus wrongly concluded he failed to make the necessary inquiries. In this case, the evidence supported the Purchaser/Intervener's contention that it was entitled to rely on the rule in *Turquand*'s case.
>
> (emphasis added)

[15] We also refer to the illuminating judgment of Edgar Joseph JR FCJ from pp. 828-830 (CLJ); pp. 507-508 (MLJ) and we quote:

> *To put it another way, such an outsider may rely on the rule in Turquand's case which, when it applies, gives rise to an irrebuttable presumption, so that the company concerned is debarred from establishing or relying on the fact that the proceedings were irregular and unauthorised.*
>
> *The rule in Turquand's case cannot, however, be invoked by an outsider who knows or ought to know that there is an irregularity.*
>
> More particularly, outsiders dealing with a company who know that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule (see *Howard v. Patent Ivory Manufacturing Co* (1888) 38 Ch D 156). This is an exception to the rule in *Turquand*'s case and the burden of establishing it lies on the party invoking the exception and in this case, that would be the Father and his faction. Furthermore, outsiders dealing with a company could also be affected by knowledge of facts which would put a reasonable person on inquiry; in other words, they would be deemed to know what a reasonable person would infer from known facts. So, for example, in *B Liggett (Liverpool) Ltd v. Barclays Bank Ltd* [1928] 1 KB 48 at pp 56-56, Wright J (as he then was) said:
>
> > *... Whatever may be the exact scope of the rule in Turquand's case, I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied upon by a person who is put on inquiry. The*

rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule …

And, in *Morris v. Kanssen & Ors* [1946] AC 459, Lord Simonds made it clear that an outsider cannot invoke the benefit of the *Turquand* rule if he is put upon inquiry. Here is what his Lordship said on this point (at p. 475):

… He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

So also, an outsider dealing with a company cannot invoke the benefit of the Turquand rule if he could or should in the circumstances have discovered the defect by inspecting the compulsory documents filed at the Registry of Companies which are open to public inspection. (See Irvine v. Union Bank of Australia (1877) 2 App Cas 366.)

The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. (See *Kanssen v. Rialto (West End) Ltd & Ors* [1944] Ch 346; *Morris v. Kanssen & Ors* [1946] AC 459.)

We need hardly add that the rule in *Turquand*'s case is designed to protect not the company itself but persons dealing with the company. It follows that there is no reason why persons, including outsiders, who enter into transactions with a company, and who are sued should not invoke the benefit of the rule as a defence. (See *Howbeach Coal Co Ltd v. Teague* (1860) 5 H & N 151, 157 ER 1136; *Garden Gully United Quartz Mining v. McLister* (1875) 1 App Cas 39.)

So far as the burden of proof is concerned, when the doctrine of the *bona fide* purchaser for value without notice is invoked, we are inclined to the view that the burden of showing lack of notice is on the person invoking the doctrine. (See *Ninety-Five Pty Ltd v. Banque Nationale de Paris* (1988) WAR 132; *cf Re Dover Pty Ltd* (1981) 6 ACLR 307 at p 310.)

Whether or not the outsider was put on notice is a question of fact on which other cases are of no assistance.

(emphasis added)

[16] Lee in this case on the facts did not verify the position of Siva in the plaintiffs' companies by way of a search. Lee did not check on the status of the land and all payments were made to Siva. (See notes of evidence tab 28, pp. 197-209)

[17] The learned judge in paras. 43, 44 to 48 of his grounds of judgment made findings of fact in relation to the authority of Siva to act on behalf of the plaintiffs which the learned judge held he had not. The Court of Appeal particularly in paras. 30 and 31 of their grounds of judgment found there was no evidence to impute Lee with a need to be put on an enquiry, despite the

fact that Lee had failed to make any company or land searches. We found the Court of Appeal had misdirected itself on its reversal of the High Court's finding of facts and curial intervention is called for.

[18] Reference is drawn also to the case of *Criterion Properties v. Stratford UK Properties* [2004] UKHL 28 and we quote at para. 31 the judgment of Lord Scott:

> [31] Both Hart J and the Court of Appeal thought that the SSA was clearly contrary to the commercial interests of Criterion. Hart J thought that Oaktree must have known, or be taken to have known, that that was so. I do not wish to be taken to be saying that knowledge of this sort on the part of Oaktree, or knowledge by Oaktree that Mr Glaser and Mr Palmer were, in signing the SSA, in breach of the duty they owed to Criterion, would be irrelevant to the authority issue. *If a person dealing with an agent knows that the agent does not have actual authority to conclude the contract or transaction in question, the person cannot rely on apparent authority. Apparent authority can only be relied on by someone who does not know that the agent has no actual authority. And if a person dealing with an agent knows or has reason to believe that the contract or transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for the person to assert with any credibility that he believed the agent did have actual authority. Lack of such a belief would be fatal to a claim that the agent had apparent authority.*
>
> (emphasis added)

Siva's plea of actual authority had been rejected by both the High Court and Court of Appeal. It therefore follows Siva acted on a frolic of his own. We find the High Court Judge was correct in rejecting a plea of ostensible authority as the evidence clearly shows Lee could have ascertained the actual position by making the relevant searches.

[19] What is the effect of the particulars of Form 49 on an "outsider"? We refer to the decision of this court in *KL Engineering Sdn Bhd & Anor v. Arab Malaysian Finance Bhd* [1994] 2 BLJ 150; [1994] 2 MLJ 201.

> (1) The common law doctrine of constructive notice should apply to Form 49 which is a public document containing particulars of directors who are the mind and will of the company as well as managers and secretaries who are responsible for the day-to-day running of the company. Therefore, persons dealing with the company should check with the Registrar of Companies who its directors, managers and secretaries are at any time.
>
> (2) As Form 49 is a public document to which the common law doctrine of constructive notice applies, the respondent, who had been put upon inquiry of its contents, but failed to check, must be presumed to have known that Kow Yuen Wah was not a director of the first appellant and was therefore, not authorized to sign the hire-purchase agreement on the company's behalf. Accordingly, as the hire-purchase agreement was signed by an unauthorised person on behalf of the first appellant, the latter could not be made liable under the hire-purchase agreement.

and to the judgment of Mohamed Dzaiddin SCJ delivering judgment of the court particular at pp. 154-155 (BLJ); pp. 208-209 (MLJ), which we quote in agreement:

> However, the next important question is whether Form 49 comes within the category of public documents upon which persons dealing with the company is deemed to have notice of its contents. The learned author of *Charlesworth & Cain on Company Law* is of the view that the doctrine applies presumably to the list of directors because it is a public document which is open to public inspection at the Registry of Companies. On the other hand, the learned author of 1 Palmer's Company Law (24th Ed) discussed the issue in more detail at para 21-02:
>
> > It is sometimes not easy to determine which of the company's documents are public documents and which concern only its internal management. In principle only documents which are registered with the Registrar can be public documents, but, as we shall see, not all of them have this character.
>
> Obviously the memorandum and the articles are public documents. Special resolutions, if duly registered in accordance with s. 380, likewise become public documents. The same would appear to apply to other resolutions required to be registered under s. 380.
>
> It would further appear that charges on the undertaking of the company or on specific property belonging to it, if registered according to s. 395 *et seq*, are likewise public documents, but this applies only to the registered particulars and not to 'special provisions contained in that charge restricting the company from dealing with their property in the usual manner when the subsisting charge is a floating security'.
>
> Beyond this no guidance can be obtained from decided cases on what are public documents of registered companies. It is thought that not all documents which a company has to register fall within that category. A distinction has to be drawn between documents affecting the powers of the company and its agents and other documents. Only documents which fall into the former category are public documents, eg the other resolutions – other than special resolutions – requiring registration under s 380 and particulars relating to the directors (see s. 288), but documents falling within the second category, such as balance sheets or entries in the register of directors' interests (see s. 325), are not, it is thought, 'public documents' because their purpose is merely to provide information of the financial position of the company or the interest of its managers in the company.
>
> The conclusion that follows from the above opinion, with which we respectfully agree, is that the common law doctrine of constructive notice should apply to Form 49. To reiterate, Form 49 is a public document which contains particulars of directors who are the mind and will of a company, as well as managers and secretaries who are responsible for the day-to-day running of the company. It is a document which affects the powers of the company and its agents. Certainly, its purpose must be more

A than just to provide information about the company's directors, managers and secretaries. Therefore, persons dealing with the company should check with the Registrar of Companies who its directors, managers and secretaries are at any given time.

Cik Jennifer Tay has urged us to treat Form 49 as an 'indoor
B management' document so that the respondent could take advantage of the rule in *Turquand*'s case. This rule was stated by Lord Simonds in *Morris v. Kanssen* as follows (at p. 474):

> But persons contracting with a company and dealing in good faith may assume that acts within its constitution and power have been properly and duly performed and are not bound to inquire whether
C acts of internal management have been regular.

According to His Lordship (at p. 475):

> It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with
D whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

E *Based on Lord Simond's dictum, we say with confidence that the rule in Turquand's case does not apply here. We hasten to add that as Form 49 (D14) is a public document to which the common law doctrine of constructive notice applies, the respondent, having been put upon inquiry of its content, but failed to check, must be presumed to have known that at the material time, James Kow Yuen Wah was not*
F *a director of the first appellant and was, therefore, not authorised to sign P7 on the company's behalf. Accordingly, as P7 was signed by an unauthorised person on behalf of the first appellant, the latter cannot be made liable under the hire-purchase agreement, P7.*

(emphasis added)

G **[20]** It is no longer a question of whether the "outsider" had been put on enquiry, but the "outsider" had imputed to him particulars of Form 49 and should have taken steps to enquire further to come within the rule of *Turquand*. By way of further illustration of the point, we refer to the decision of the High Court of Australia in *Northside Developments Pty Ltd v. Registrar*
H *General And Others* [1990] 93 ALR 385 where it was held:

> (i) "Per Mason CJ and Brennan J; semble Dawson, Toohey and Gaudron JJ obiter: A third party dealing with a company is not entitled to rely on the formal validity of an instrument and to assume that the seal has been regularly affixed if the very nature of the transaction is such as to put him on inquiry. A person dealing with a company is put upon inquiry when
I that company enters into a transaction which appears to be unrelated to the purposes of its business and from which it appears to gain no benefit.

(ii) Per Mason CJ, Dawson and Toohey JJ: There was no representation by the directors that the seal was affixed with their authority or that they had approved the transaction. The transaction was completed without the actual or apparent authority of the appellant"

[21] We also refer to the judgment of Mason CJ at para. 40 to pp. 395-396 which we now quote:

What is important is that the principle and the criterion which the rule in Turquand's case presents for application give sufficient protection to innocent lenders and other persons dealing with companies, thereby promoting business convenience and leading to just outcomes. The precise formulation and application of that rule called for a fine balance between competing interests. On the one hand, the rule has been developed to protect and promote business convenience which would be at hazard if persons dealing with companies were under the necessity of investigating their internal proceedings in order to satisfy themselves about the actual authority of officers and the validity of instruments. On the other hand, an overextensive application of the rule may facilitate the commission of fraud and unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are the victims of unscrupulous persons acting or purporting to act on behalf of companies Agency principles aside, to hold that a person dealing with a company is to put upon inquiry when that company enters into a transaction which appears to be unrelated to the purposes of its business and from which it appears to gain no benefit is, in my opinion, to strike a fair balance between the competing interests".

(emphasis added)

We are in consonant with the views expressed by Mason CJ, that the contemporary approach to the rule in *Turquand*, should be the approach as suggested by Mason CJ.

We therefore answer Q1 in the negative.

Question (ii) approved by the court (See AR pp. 2-4) is as follows.

Can an outsider rely on the rule in *Turquand*'s case and the principles of ostensible authority of a person to bind a company where the 'holding out' or representation of authority is made solely by the person with no authority?

[22] Siva had no authority to act for the companies. There were no resolutions produced to testify to that fact. The purported letters of authority remained as ID and were never tendered as exhibits and LTH was never called to testify. There had been extensive submissions as to the plaintiffs infringing s. 114 illustration (g) of the Evidence Act 1950 but the burden to show authority rested with Siva. At any rate, his plea of authority had failed both in the High Court and in the Court of Appeal. Upon observation of the tenancy agreement (see tab 26 CCB), it is noted that LTH and not Siva had signed the tenancy agreement as the landlord. In fact, the only representation of ostensible authority had been made by Siva and that is the plea of Lee. Under those circumstances, can the respondent plead the rule in *Turquand*? The answer is most certainly no.

[23] We refer to the often quoted case of *Freeman and Lockyer (A Firm) v. Buckhurst Park Properties (Mangal) Ltd & Another* [1964] 1 All ER 630 and to the judgment of Lord Diplock at p. 645 para. E to H and p. 646 para. A to C and we quote:

> *The second characteristic of a corporation, viz, that unlike a natural person it can only make a representation through an agent, has the consequence that, in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his "apparent" authority must be made by some person or persons who have "actual" authority from the corporation to make the representation. Such "actual" authority may be conferred by the constitution of the corporation itself, as, for example, in the case of a company, on the board of directors, or it may be conferred by those who under its constitution have the powers of management on some other person to whom the constitution permits them to delegate authority to make representations of this kind. It follows that, where the agent on whose "apparent" authority the contractor relies has no "actual" authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation the contractor cannot rely on the agent's own representation as to his actual authority. He can rely only on a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.*
>
> If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown: (a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (b) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (c) that he (the contractor) was induced by such representation to enter into the contract, i.e. that he in fact relied on it; and (d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.
>
> The confusion which, I venture to think, has sometimes crept into the cases is, in my view, due to a failure to distinguish between these four separate conditions, and in particular to keep steadfastly in mind (first) that the only "actual" authority which is relevant is that of the persons making the representation relied on, and (second) that the memorandum and articles of association of the company are always relevant (whether they are in fact known to the contractor or not) to the questions (i) whether condition (b) is fulfilled, and (iii) whether condition (d) is fulfilled, and (but only if they are in fact known to the contractor) may be relevant (c) as part of the representation on which the contractor relied.
>
> (emphasis added)

[24] The pleadings of Lee clearly show the representation of authority relied on were made by Siva to Lee and that Siva was the MD and director of both companies at the time of the contract but Lee had constructive knowledge that Siva was not (see para. 7 of Lee's statement of defence p. 101, CCB)

[25] The learned trial judge in his grounds of judgment at para. 42 clearly set out the representations made by Siva to Lee. The apparent authority granted by LTH in these letters remained IDs. The learned trial judge in para. 42 of the grounds of judgment clearly made a finding of fact that Siva had no authority actual or ostensible to act for the companies. The Court of Appeal in its grounds of judgment, in para. 25, accepts that no searches on the land or with SSM were made. This specific issue as a corollary to the rule in *Turquand* was not considered by the Court of Appeal as a precondition to relying on the rule in *Turquand*.

[26] We therefore answer question (ii) in the negative.

[27] In the upshot:

(i) the appeal is allowed with costs of RM30,000 to the appellants subject to allocator fee.

(ii) the order of the Court of Appeal is set aside.

(iii) the order of the High Court is restored.

(iv) deposit is refunded.